STATE OF MICHIGAN
IN THE SUPREME COURT

In Re: Estate of James Erwin, Sr.

Supreme Court Case No.	**153980 & 153981**
Court of Appeals Case No.	**323387 & 329264**
Saginaw Probate Court No.	**13-130558-DE**

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APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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I. COUNTER-STATEMENT IDENTIFYING THE ORDERS APPEALED FROM

Appellee Maggie Erwin (Maggie) requests the denial of Appellant Beatrice King's (King) application for leave to appeal the Court of Appeal's opinion of May 10, 2016 affirming several probate court orders in Maggie's favor. The Court of Appeals consolidated two dockets, 3323387 and #329264, in the opinion. Exh. 1, 5/10/16 COA Opinion.

It is not entirely clear what issues Appellant is asking to be reviewed because the body of the application argues issues not raised in Appellant's questions presented.[1] Any issue not included as a question presented and any probate court order King did not attach should be stricken. Nevertheless, Appellee's response will address all the following rulings discussed in body of the application:

1) The Court of Appeals applied MCL 700.2801(2)(e)(i) to find that Maggie is the surviving spouse with a right to inherit from James, affirming the probate court's opinion of July 17, 2014 and the Order entering it of Aug. 7, 2014. Exh. 2, 7/17/14 P.Ct. Opinion COA Docket #323387. King failed to meet her burden of proving that Maggie Erwin willfully absented herself from her spouse, James Erwin, before he died, because King's only evidence was the single bare fact that Maggie and James had not cohabitated for 30 years. To the contrary, there was evidence that James and Maggie affirmed their marriage and emotional connection in a verified complaint jointly filed 2 years before James died which alleged that if Maggie died it would cause him "irreparable harm."

[1] The issues in King's Table of Contents do not match those in her Questions Presented. Specifically, whether Maggie Erwin is precluded as surviving spouse by MCL 700.2801(e)(2) is missing. King also argues but failed to attach 3 probate court orders and opinions of 5/6/15, 5/28/15 and 8/26/15.

2) The Court of Appeals affirmed that the probate court's ruling of July 17, 2014 that Maggie was not unjustly enriched by receiving entireties property when James died was within the range of principled outcomes, by applying the factors outlined in the controlling case of *Tkachik v Mandeville,* 487 Mich 38, 790 NW2d 260 (2010) because there was evidence James supported Maggie, left her his life insurance, never sought to disinherit her, she was found to qualify as his surviving spouse, and there were no other special factual circumstances to warrant equitable relief to James' estate. Exh. 2.

3) The Court of Appeals ruled that the probate court did not abuse its discretion by refusing to change venue 18 months after King consented to venue in Tuscola County. This ruling affirmed the probate court's opinion and an order denying a change of venue of May 6, 2015, and part of the order of Aug. 26, 2015 denying rehearing of the venue matter. Exh. 3, 5/6/15 P.Ct. Opinion & Order; and Exh. 5, 8/26/2015 P.Ct. Order, COA Docket #329264.

4) The Court of Appeals affirmed the probate court's order of May 28, 2015 removing King as personal representative and part of an order of Aug. 26, 2015 denying rehearing on the matter. Exh. 4, 5/28/15 P.Ct. Order; and Exh. 5, 8/26/15 P.Ct. Order, COA Docket #329264. The courts agreed that as James's spouse, Maggie was an interested person with standing to petition to remove King as personal representative, regardless of whether Maggie qualified as *surviving* spouse to inherit or not, and also agreed that substantial evidence of familial conflict resulting in King's refusal to perform her statutory duty to account, even after an heir's request, unduly burdened the estate thus justifying the probate court's order to remove King as personal representative.

5) The Court of Appeals affirmed that the probate court did not abuse its discretion or by refusing to disqualify the judge for bias because her actions did not display deep-seated favoritism and her rulings against King had sound legal bases. Exh. 5.

II. COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals properly interpret MCL 700.2801(2)(e)(i) to require a trial court to determine whether a spouse is willfully absent from the decedent spouse for purposes of inheritance by considering all the facts and circumstances of the case, rather than just a physical separation?

Court of Appeals answered:	Yes
Probate Court answered:	Yes
Appellant answered:	No
Appellee answered:	Yes

2. Under any standard of review, did King fail to present evidence that Maggie's absence from James was "willful" under MCL 700.2801(2)(e)(i), and thus the determination that Maggie is the surviving spouse should not be disturbed on appeal?

Court of Appeals answered:	Yes
Probate Court answered:	Yes
Appellant answered:	No
Appellee answered:	Yes

3. Did the Court of Appeals properly rule that Maggie was not unjustly enriched and need not contribute to the estate for receiving entireties property because there was evidence James supported Maggie, left her his life insurance, never sought to disinherit her, she was determined to be his surviving spouse, and there were no other special circumstances warranting such relief, according to *Tkachik v Mandeville*, 487 Mich 38, 790 NW 2d 260(2010)?

Court of Appeals answered:	Yes
Probate Court answered:	Yes
Appellant answered:	No
Appellee answered:	Yes

4. Did King's consent to venue in Tuscola County justify finding that the probate court did not abuse its discretion by denying King's petition to change venue 18 months later?

Court of Appeals answered:	Yes
Probate Court answered:	Yes
Appellant answered:	No
Appellee answered:	Yes

5. Did the evidence show that familial conflict, which extended to King's failure to perform her statutory duties and complicated and unduly burdened the estate, justify the Court of Appeal's affirmative ruling that it was in the best interest of the estate to remove King as personal representative?

Court of Appeals answered:	Yes
Probate Court answered:	Yes
Appellant answered:	No
Appellee answered:	Yes

6. Did the Court of Appeals properly rule that the probate court did not abuse its discretion in refusing to disqualify the judge because the trial court's actions and rulings against King had sound legal bases and did not demonstrate bias?

Court of Appeals answered:	Yes
Probate Court answered:	Yes
Appellant answered:	No
Appellee answered:	Yes

IV. INTRODUCTION

Appellant's application for leave to appeal arises from two consolidated appeals, each of which affirmed multiple probate court orders regarding the decedent, James Erwin, Sr. and his family. The Appellant, Beatrice King, was personal representative of the estate, and she and her attorney, L. Fallasha King, are children from James's first marriage. Appellee, Maggie Erwin is James's surviving spouse from his second marriage.

The first appeal in Docket #323387 upheld the probate court's findings that Maggie was not "willfully absent" from James for at least one year before he died, and therefore she qualifies as his surviving spouse under MCL 700.2801 to inherit from his estate, and also that Maggie need not contribute to the costs of James's estate because receiving James's residence worth $15,000 when he died did not unjustly enrich her.

Regardless of how MCL 700.2801 is interpreted, King cannot be found to have met her burden of proving that Maggie's absence from James was "willful" because King only offered the uncontested fact that Maggie and James did not cohabitate for 35 years, and no evidence or even allegation that the failure to live in the same house was Maggie's free choice and therefore "willful" on her part. Moreover, Maggie and James filed affidavits and verified pleadings two years before James died affirming their marriage and attesting that if Maggie died, James would suffer "irreparable harm" because her life was "irreplaceable" to him. Given that King's attorney is the same stepson who represented Maggie and James in the earlier case, it is unsurprising that King did not object to the unsigned versions of the pleadings in the probate court – pleadings King now argues are "unauthenticated" and "hearsay."

King's challenges to the probate court's other rulings are based on similar distortions of the record. King filed 4 motions for a stay and many, many other pleadings, objections and responses, arguing nearly the same things each time: that Maggie should not be considered an interested person with standing to act in probate court so long as her status as spouse was on appeal, and that Maggie and her children were hiding substantial assets that belong to the estate. Yet after two years as personal representative, King disclosed $0 assets, never accounted for the $7,000 or less of asset information that was turned over to her, never filed a turnover or conversion action against anyone to recover missing or stolen assets, and never even followed up on the court's order allowing King to renew her request for discovery sanctions if King could clarify what specifically she claimed the heirs were withholding.

The probate court properly removed King as personal representative, ordered attorney fees as sanctions against both King and her attorney, affirmed again and again that Maggie was an interested person in the case, and denied King's motions to change venue and to disqualify the judge for bias, which King filed *after* Maggie and her daughter filed to remove King and 18 months after King had stipulated to venue. Maggie and her children feel victimized by the endless litigation and appeals – all over exactly $0 King reported in assets. Accepting this case for review would only serve to continue the punishment.

V. COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Appellee Maggie Erwin submits the following counterstatement of facts pursuant to MCR 7.212(C)(6). Appellant King's statement of facts does not conform to the requirements of MCR 7.212(C)(6) because it excludes unfavorable material facts, and

substantially mischaracterizes and misstates both the probate court and Court of Appeals records. In addition, King's application omits specific page references. Some, but not all, of these errors are discussed below. Maggie therefore requests that King's Statement of Facts be stricken from the record.

A. Family and asset information, and early probate proceedings.

James Erwin, Sr. died intestate on Oct. 12, 2012 survived by his spouse, Maggie Erwin, and 10 children: six from his first marriage, and four from his marriage to Maggie. Both Appellant, Beatrice King, and her attorney, L. Fallasha Erwin, are children from James's first marriage. James and Maggie married in 1968.

King applied for appointment as personal representative of the estate in Saginaw, where James owned a house with Maggie on Douglass St and lived until 6 months before his death, when he went to Kansas to stay with his daughter, Jacqueline Nash, due to poor health. Maggie and James purchased the house in 1973 and it is undisputed they did not cohabite there after 1976. The record is silent as to why Maggie moved out. James and Maggie consented to an order in 1976 for James to pay child support.[2] Maggie and James never filed for divorce or legal separation or had any pre or postnuptial agreement.

Two years before he died, Maggie and James joined together in filing a complaint to restore Maggie's health insurance which James's employer, GM, had erroneously cut off. The 2010 pleadings were verified and included affidavits signed by Maggie and James. See COA #323387 Appellee Brief Exh. 3. (See also Appellee's First and Second Motions and related Orders to Supplement the Record, COA #323387.) The original pleadings were also signed by their attorney, L. Fallasha Erwin, Maggie's stepson, who

[2] King's assertion in her application (at 1) that Maggie's move was "voluntary" and that James did not support Maggie is unsupported by the record.

now represents King in claiming that Maggie should not be considered the surviving spouse of James. The 2010 pleadings state:

> If a temporary restraining order is not issued by the court, plaintiffs could suffer **irreparable harm** which could cause them to lose a valuable and unique asset, the **life of Maggie Erwin, which would be irreplaceable for her husband** and many children and grandchildren and is **not replaceable by a money damage award.** (Emphasis added.) Id.

There is no evidence that the relationship between Maggie and James soured after they filed the 2010 pleadings and before James died in 2012. Both were elderly and had serious health problems during that time. There is no evidence that James asked for or failed to receive support from Maggie before his death, or that James sought to prevent Maggie from receiving his estate, life insurance or the Douglass St. house.

James died without a will. The value of the Douglass St. house was $14,442 according to tax records, and Maggie inherited it as entireties property. Maggie was also the beneficiary of James's life insurance.[3] King, her attorney and some other heirs went through the home shortly after James died. According to affidavits submitted by King and to information reported to King by heirs during discovery, James's assets included clothing and personal effects, 2 small bonds, small dividend checks evidencing possible stock, a $5,000 loan note (possibly repaid) signed by James's daughter, Stacy Erwin Oakes, and a possible wrongful death claim for asbestos exposure. Jacqueline Nash also

[3] King did not challenge that Maggie received James's life insurance in the lower court proceedings. King falsely states in her application for leave to appeal (p. 25) that "King never received, even though requested, evidence that Maggie remained the beneficiary on JES employment life insurance policy." King's own application belies this statement. See Appellant's Application Exhibit D which includes as Exhibit D a check issued from Maggie's MetLife Total Control Account, the insurance account. King also sent a subpoena (without notifying opposing counsel) to MetLife and received documents confirming that Maggie was beneficiary.

disclosed that she and her father jointly owned two Merit bank accounts and one Capital Federal Savings account.[4] See COA #329264 Appellee Brief Exh. 7.

King and L. Fallasha Erwin repeatedly alleged that there were more substantial concealed assets other heirs refused to surrender. For example, L. Fallasha Erwin told the court "I'm the oldest child of James Erwin. I consulted with my father quite a bit. . . . I basically knew what was in his estate. . . . Nothing has been turned over to the estate. Although we requested items, nothing has been turned over." COA #323387 Appellee Brief Exh. 4, 7/6/14 Tr 4-5. He claimed "There were tons of things in that house. Tons of stuff. Old stuff that she had to go through. I have pictures that we've taken of the property to show. . . . We went after unclaimed refunds that we picked up." Id 18. He also reported that "I brought affidavits where we had someone that was there when Jackie Nash took out materials from the estate." Id 20. He also stated that "We have less than, I would say probably less than $2,000. We've been spending out of pocket." Id 21.

The only inventory King filed and served on heirs disclosed $0 assets. COA #329264 Appellee Brief Exh. 8 During the 2 years she was personal representative, King did not collect the asbestos claim, the stocks or bonds, sue Erwin Oakes for the loan King's believes was unpaid, or sue Nash for the jointly-owned bank accounts. King did not amend the inventory to include any of the assets disclosed above – even the "unclaimed refunds" King said they had picked up. King never accounted to the heirs, or disclosed whether or not the stocks, bonds, asbestos claims, or joint funds belonged to the estate, or otherwise explain what King did with the unclaimed funds they picked up.

[4] King's application statement that "no heir responded to the request for certain material and information" (at 7) is false. King's own probate pleadings and attached affidavits attested to some asset information King received before the motion and never reported on the inventory. See generally Personal Representative's Motion for Sanctions, at 6 and Exh G, H, I, and K, docketed 6/9/14.

King had opened the probate case in Saginaw County, but the judge's conflict resulted in assignment of the case to the Tuscola judge. King stipulated to venue there.

B. King's discovery conducted without a civil action or probate proceeding, and King's motions to compel discovery and for sanctions.

Three months after her appointment, King filed her first probate court litigation: a motion to compel other heirs' answers to discovery. King had not filed any civil action or proceeding but she had nevertheless served formal discovery requests on some of the heirs. The heirs failed to object to King's motion to compel, though they could have argued, as they did later, that MCR 5.131 permits formal discovery only in the context of civil actions initiated by a summons and complaints or proceedings initiated by petitions for specific relief pursuant to MCR 5.101. The probate court issued an order to compel. Maggie was ordered only to give King access to the Douglass house which she did. Nash gave King the house keys and access code to the safe, and King eventually was able to inspect the safe again. COA #329264 Appellee Brief Exh. 7. Nash, Erwin Oakes and their brother, Billie Erwin, submitted written responses to King's discovery requests.

Nash filed a petition to remove King and then dropped it after her attorney withdrew from the case for erroneously submitting a stipulation to adjourn the hearing that King's attorney had not in fact stipulated to.

King then petitioned to sanction heirs – including Maggie - for failing to abide by the order compelling discovery. Maggie, Nash and Erwin Oakes responded that King's own exhibits showed that they had in fact answered discovery and given King access to Douglass St., but that King simply disliked their responses.[5]

[5] Again, King's own petition evidenced that King already accessed the house at least twice prior to filing the motion to sanction Maggie. See King's supporting brief Exhs H, I and K.

The probate court declined to sanction Maggie or her children for discovery violations, finding that inspection of the house had occurred, and that King's pleadings were unclear about what King had or had not received from the other heirs, and what specifically was in dispute. The court granted King the right to submit new discovery limited to written interrogatories to the heirs regarding James's assets, and invited King to reschedule an evidentiary hearing afterwards if necessary to reconsider sanctions. Exh. 2, Section 1. This portion of the opinion was not appealed. King never renewed her request for sanctions, but continued in nearly all subsequent pleadings to allege that the probate court wrongly denied sanctions and blocked King's efforts to recover assets.

C. King's petition to preclude Maggie as James's surviving spouse, and for compensation for unjust enrichment.

In conjunction with the petition for discovery sanctions, King petitioned for two other types of relief: 1) a determination that Maggie was "willfully absent" from James or had abandoned him, and was not entitled to inherit as James's surviving spouse pursuant to MCL 700.2801(2)(e)(i) and (ii) because they had not cohabited for more than a year before James died; and 2) for reimbursement of the costs of the Douglass St. property under the equitable theory that Maggie was unjustly enriched by receiving it as entireties property, citing *Tkachik v Mandeville*, 487 Mich 38; 290 NW2d 260 (2010). See COA #323387 Appellee Brief Exh. 5.

At hearing, King's counsel submitted 3 affidavits from non-family members attesting that Maggie had not cohabitated with James at the Douglass property for over 30 years. King called no witnesses and stated he would rely on his written pleadings, though he wanted a chance to address his opponent's oral arguments. COA #323387 Appellee Brief Exh. 4 7/9/14 Tr at 7-9, 14-15, 31. King argued on the record that because they had

not lived together for 30 years Maggie could not qualify under any circumstances as James's surviving spouse for intestate purposes. Id. at 11, 14-15, 31.

Maggie's counsel responded by producing the unsigned duplicates of the 2010 verified pleadings in the GM case with the affidavits as evidence that James and Maggie had recently affirmed their marriage and emotional connection, even though James and Maggie had not lived together for whatever reason. Thus Maggie should be considered a surviving spouse and no equitable compensation was warranted. COA #323387 Appellee Brief Exh. 6 & Exh. 4 7/9/14 Tr. at 17-18, 20-22.

At the probate hearing, King's attorney did not contest the submission, form, credibility or content of the unsigned copies of the 2010 GM verified pleadings and affidavits. King submitted no evidence, argument or authority to cast doubt on the authenticity or veracity of the verified pleadings or affidavits. Rather, L. Fallasha Erwin admitted that he personally filed the original 2010 complaint. Id at 15.

Contrary to King's application statement that "Maggie never assisted or maintained a relationship with JES in any fashion after her departure in 1976" (at 6), King's attorney stated to the probate court that James and Maggie had maintained a relationship. Id at 14-15. King's attorney did not contest that Maggie was entitled to retain what she received from the decedent as beneficiary. Id. at 14-15. King's pleadings do not allege, nor was there an offer of evidence at the hearing, of antagonism or estrangement to support the claim that Maggie's absence from James was willful, although after other parties made responsive arguments King asked for "the opportunity to bring other people in" in an apparent effort to counter what King considered inaccurate statements about James's assets and who transported James to Kansas. Id at 29, 35.

King mischaracterizes the decision to move as Maggie's "voluntary" choice (at 1), when in fact King alleged no reason why Maggie moved out.

The probate court did not question the validity of the uncontested, unsigned versions of the 2010 verified pleadings and affidavits, and found them to be persuasive evidence to qualify Maggie as the surviving spouse. The probate court also ruled Maggie was not unjustly enriched by receiving the house as the entireties survivor. The court distinguished the *Tkachik* case by finding that James and Maggie "chose a separated lifestyle" and neither had willfully abandoned the other. Multiple orders were entered July 17, 2014, and section 2 most concerns the rulings in this application. Exh. 2. King appealed the denial in COA Docket #323387.

D. Funeral costs: Maggie's civil action seeking reimbursement, King's motion to enforce a stay of the action, and Maggie's protective order against King's discovery.

To preserve her claim as a creditor of James's estate from being permanently time-barred, Maggie then filed a civil summons and complaint within the probate case seeking reimbursement of James's funeral expenses. King had disallowed the claim as late and the matter remains pending. See generally P.Ct. 13-130558-CZ.

To stop the funeral claim, King filed a motion in the probate court for sanctions and to enforce what King argued was an automatic stay on appeal imposed by MCR MCL 600.867(1) and MCR 5.802(C). Ignoring Maggie's standing as spouse and creditor, King argued Maggie had no standing to petition the court while her status as surviving spouse was in question on appeal. Maggie argued King misstated the relevant law and facts and requested sanctions in her favor, because the July 17, 2014 opinion was not a final order of the funeral claim, and that in any event, King had not appealed the

funeral issue so the automatic stay did not apply. The court denied King's motion to enforce the stay, and reserved and preserved Maggie's request for sanctions and costs for defending a frivolous motion. COA #329264 Appellee Brief Exh. 10, Order.

Discovery of the funeral action commenced and then Maggie petitioned and received a protective order regarding King's discovery. King had secretly served subpoenas on banks and on Metlife without serving copies on opposing counsel. Maggie also sought to preclude Maggie's deposition because of her well-known health ailments as outlined in the 2010 GM pleadings. Maggie objected to portions of King's discovery that exceeded both the scope of the funeral lawsuit and as permitted by the July 17, 2014 opinion allowing only written interrogatories on asset issues. The court granted a protective order barring Maggie's deposition and striking some of King's discovery deemed not to comply with court rules or with the court's order. The court ordered King to serve all subpoenas on all attorneys of record.[6] Maggie answered the other discovery materials.

King objected to Maggie Erwin's proposed protective order, argued again that Maggie was not an interested person while her status as spouse was on appeal, and scheduled a hearing for May 27, 2015. A temporary restraining order changed the hearing date to May 18. (See below.) King did not appear on May 18. The probate court agreed with Maggie that King's motion raised nothing new and was merely "another bite at the apple." COA #329264 Appellee Brief Exh. 16, 5/18/15 Tr at 21. Maggie's proposed protective order was entered. COA #329264 Appellee Brief Exh. 11.

[6] King's application (at 29) thus falsely claims there was "no evidence" in the record that she disregarded a court order or mismanaged the estate.

E. Proceedings to remove King as personal representative and related matters.

1. Petitions by Maggie & Erwin Oakes to remove King

In conjunction with the protective order in the funeral action, Maggie petitioned the probate court to remove King as personal representative, and to sanction King and her attorney. Maggie's petition incorporated all prior pleadings and the funeral action, and alleged that, among other things, King was hostile to Maggie and her children, King filed repetitive pleadings with no basis in fact or law and failed to follow the court's orders, King refused to provide a meaningful inventory or account even after requested to, and King had done nothing effective for two years to recover the stocks, bonds, loans, joint accounts, or other substantial assets King's attorney claimed belonged to the estate. See COA #329264 Appellant Brief Exh. E and H.

Erwin Oakes filed a response joining and supporting Maggie's petition, which included a letter from King's attorney refusing Erwin's Oakes's request for an accounting despite Erwin Oakes's citation of the court rule that required King to account to heirs. King's letter rejected the request as frivolous and stated "you can either check your arrogance at the door or I will be treated [sic] you with the disrespect you deserve." COA #329264 Appellee Brief Exh. 12.

Disregarding MCL 700.3703(4)'s requirement that a personal representative must annually account to heirs, King's written response argued that because court rules excused her from filing the account with the court, she was excused from accounting to the heirs. King's pleadings stated that "King's counsel had personal knowledge that JES (James) "held several accounts exceeding six figures in balances" and "kept large sums of cash in his house." COA #329264 Appellee Brief Exh. 13. King claimed again that

the heirs had in fact blocked her efforts to investigate assets, and denied that she was hostile, had mismanaged the estate or failed to follow court orders. Though the court had already ruled otherwise, King again argued that Maggie had no standing to pursue King's removal because she was not an interested person while her status as surviving spouse was on appeal. COA #329264, Appellant Brief Exh. F.

King filed a second motion in the Court of Appeals to stay all proceedings and in particular the petition to remove King arguing that Maggie Erwin had no standing as an interested person while her status was on appeal to file the petition. See COA Docket #323387, Motion docketed 4/20/15. Maggie contested King's assertions, arguing that she qualified as spouse under MCL 700.1105(c), as a creditor with a disputed claim, and generally as a person with an interest in the estate to petition to remove King. The Court of Appeals denied the stay by 2-1 on May 14, 2015.

At the initial hearing to remove King, King objected to the court hearing the matter because Maggie's petition lacked a verification statement. The court directed Maggie to file an amended petition and re-notice the matter for hearing. Maggie did so, setting the hearing for May 18, 2015. All heirs were served. Erwin Oakes filed a separate petition and notice of hearing for the same day. See COA #323387 Appellee Brief Exh 4, P.Ct. Docket.

2. King's motion to change venue and Maggie's petition to restrain King while the petition to remove King was pending

Before the May 18 hearing to remove King, King filed a motion scheduled May 6 to change venue. King also scheduled for May 27 her objection to entry of the protective order in the funeral claim. Maggie's original petition to remove King had not been withdraw or abandoned.

King's venue motion relied primarily on MCL 600.856(1), arguing that Tuscola was inconvenient for the majority of heirs who lived in Saginaw, and that changing venue to Genesee county would save them 5 minutes of driving time each way. King and her attorney, who lived in Detroit, would save 1 ½ -2 hours. King also argued that an impartial trial could not be had in Tuscola because the judge appeared to be biased against King's side of the family.[7]

Maggie objected to the venue change, arguing it violated MCL 700.3611(1) which prohibits a personal representative from acting after receiving a petition to remove her, other than "to account, correct maladministration or preserve the estate." Maggie also argued it was an untimely, frivolous motion without factual specificity, and that it would unreasonably delay the case and burden the estate, the courts and other heirs. Maggie argued that King cited the wrong court rule: MCR 2.003 governs disqualification of a judge for bias. Erwin Oakes filed a written objection also. See probate court pleadings generally. None of the parties remembered that King had already stipulated to having all matters heard in Tuscola 18 months earlier.

Maggie filed a motion for a temporary restraining order under MCL 700.3607 to stop King from filing more pleadings until after the hearing to remove King. The motion was served on King and all other heirs, along with an attached proposed order containing notice that if entered, the court would decide whether to make the order permanent on May 18, 2015, the same day as the petitions to remove King were to be heard. COA #329264 Appellee Brief Exh. 4, Probate docket 5/5/2015 and Exh 14. The motion and proposed temporary restraining order also sought to consolidate King's venue and

[7] King did not allege that venue was improper in Saginaw, or that James did not reside or own property in Saginaw. King improperly argued this point for the first time on appeal and raises it again in her application.

objection to protective order hearings from May 6 and 27 to May 18. The court entered the temporary restraining order with notice that May 18 would be the hearing date for whether to make it permanent and on the protective order objection. The court did not change the venue hearing on May 6. COA #329264 Appellee Brief Exh. 14. The court served the temporary restraining order with hearing dates on all heirs.

The venue hearing was held on its originally scheduled date of May 6, 2015. King and Maggie appeared but Erwin Oakes did not, and the court proceeded without telephoning Erwin Oakes's attorney. King did not call witnesses, and primarily argued that Maggie's response should be disregarded because she was not an interested person, and that the venue was inconvenient to most heirs. King's evidence that an impartial trial could not be had in Tuscola was based on a statement the judge had made the year before. To rebut the allegation, the judge read into the transcript her statements from the earlier hearing when she asked the children to consider their father, who would "probably be looking at all of you saying, um, seriously. I have all these children and my goal was for all these children to get along. And if you're not getting along, then whose fault is it? It sure isn't James Erwin's fault. Now if it's all just about money, shame on you. Because if that's all James Erwin meant to you, that's very sad." COA #329264 Appellee Brief Exh. 15, 5/6/15 Tr. at 22 (reading from the 7/9/14 Tr.) Because the comment was directed at all the children, not just King's side of the family, the court ruled it did not support a finding that an impartial trial could not be had in Tuscola, and in any event King should have cited MCR 2.003 to try to disqualify the judge for bias. Id at 20-21.

The court ruled, as she had before, that Maggie Erwin was "still an interested party today" and "deserves notification for all motions, everything that has to do with this

matter" until the Court of Appeals said otherwise. Id, at 23-24, 26. The court explained that venue remained in Saginaw where all pleadings were still being filed, and that Judge Thane merely heard the matter on assignment and would continue to hear the case even if the location of hearings changed. The court denied King's request to change venue, denied sanctions to Maggie, and signed the order at the hearing. Later in the afternoon, the court issued a written opinion pointing out what the parties had forgotten: King's attorney had stipulated to having all matters heard in Tuscola 18 months earlier. Exh. 3.

3. King's May 18, 2015 scheduling conflict and resolution

During the May 6 venue hearing, King's attorney stated he had a conflict on May 18. The court directed him to provide proof of the conflict to opposing counsel and to the court. COA #329264 Appellee Brief Exh. 5/6/15 Tr. at 29-30. King's attorney later sent e-mails to both opposing counsels with a docket statement showing the conflict. The e-mail did not request a stipulation or confirmation that all matters on May 18 were being adjourned. COA #329264 Appellant Brief Exh. S. King later mailed a letter to opposing counsel that his May 18 conflict was resolved. COA #329264 Appellant's Brief Exh. T. Thus, there was no reason King could not appear or call in on May 18. King did not give notice of the conflict or its resolution to the court, or ask the court to adjourn any of the matters set for May 18.

King failed to appear or call the court on May 18 for the hearing to remove her (discussed below). Counsel alerted the court to L. Fallasha Erwin's e-mail with the docket conflict attached. The court allowed the hearing to continue and did not attempt to telephone King's counsel because King had not provided any notice of the docketing conflict to the court. COA #329264 Appellee Brief Exh. 17, 5/18/15 Tr at 23.

4. May 18 hearings to remove King and finalize protective order.

On May 18, 2015, several matters were scheduled to be heard: 1) Maggie Erwin and Erwin Oakes's petitions to remove King; 2) whether the order restraining King should be made permanent; and 3) resolving King's objections to the proposed protective order in the funeral case, discussed above. Maggie and Erwin Oakes appeared but King, her attorney and the other heirs did not appear or call to participate.

Maggie argued that King failed to act to properly inventory, account or collect known assets and that if there were no assets the case ought to be closed. Id. 4-6. Maggie argued that King's litigation was hostile, often raising the same arguments repeatedly with no factual or legal merit, and intended to punish Maggie and her children. Id. 8. She argued that King misstated MCR 5.125 by arguing it precluded Maggie Erwin from being considered an interested person because the rule does not even apply to petitions to remove a personal representative. Id 7. Counsel requested actual attorney fees and costs as sanctions for having to defend multiple matters that had no basis in law or fact. Id at 8-9. Erwin Oakes made similar arguments.

The probate court confirmed that King did not provide an inventory, other than the one showing no assets, or any accountings to either attorney. Id. 9-10 and 14. The court found "there was allegations that there were certain large sums of money out there, but yet there's been no proceedings whatsoever to recover any monies." Id. 18. The court also stated:

> I'm very much aware of the fact that the hours of litigation that parties have probably put into this case. Because I know how many hours it takes me to read through all these proceedings. And I do read everything. . . If there was ever a case that there needed to be a neutral person acting as the personal representative it's the estate of James Erwin." Id. 19

The court found there were repeated filings concerning the same issues, such as the protective order and other claims that Maggie Erwin was not the spouse, and called King's efforts to relitigate them "another bite of the apple." Id. 20-21. The court granted both petitions to remove King, granted both petitioners actual attorney fees as sanctions against King and her attorney, and denied attorney and fiduciary fees to King and her attorney unless the fees were shown to further the administration of the estate. There was no need to consider whether King should be permanently restrained from acting as personal representative because of the removal.

Maggie Erwin circulated a proposed order and on May 28, 2015, the court entered it. Exh. 4. Though King was not present to hear the court rule on May 18, King attempted to object to the proposed order anyway. The court rejected the objection because King did not submit a filing fee before the 7-day deadline.[8]

5. King's four motions: 1) to rehear the denial of change of venue; 2) to rehear the order removing King; 3) for a stay pending appeal; and 4) for an order disqualifying the judge for bias

On June 17, 2015, King filed four motions: 1) for rehearing of the order removing King; 2) for rehearing on the venue question; 3) for stay pending appeal; and 4) to disqualify the judge for bias. King provided affidavits from some heirs in support. (See probate pleadings generally docketed 6/18/2015.)

a. Motion for rehearing on order removing King.

King's first motion was for a rehearing on the order removing King but not for the award of attorney fees as sanctions. See COA #329264, Appellant Brief Exh CC.

[8] There is no evidence in the record to support King's irrelevant speculation that the Saginaw judge personally had anything to do with the decision to reject King's objection.

The motion argued that King and L. Fallasha Erwin had not appeared at the May 18 hearing to remove King because the court told them only to provide notice of conflict to opposing counsel and they assumed opposing counsel would adjourn the hearing once that was done. Motion #2-8. King further stated that they had no notice of the restraining order prohibiting action except to preserve the estate (Motion #6); that Erwin Oakes had not in fact separately petitioned to remove King (Motion #1); that the court should have considered appointing one of the heirs with priority to succeed King (Motion #11); that her alleged failure to file an inventory or accounting could be remedied, and should not constitute nonfeasance or malfeasance (Motion #12); and that there was no factual basis to remove King.

MCR 2.119(F)(12) prohibits responses to motions for rehearing unless the court directs otherwise. Therefore, Maggie Erin and Erwin Oakes did not file written responses.

b. Motion for rehearing on denial of change of venue.

King's second motion pled that the majority of heirs wanted a change of venue. (See generally Motion on Rehearing on Petition to Change Venue for Convenience, #4.) King argued the Court and opposing counsel did not tell King on May 6 about the restraining order, (Motion #2-3), and that the stipulation to hold hearings in Tuscola was done before they knew how inconvenient it was and the majority of heirs did not sign the stipulation. (Motion #5-9) Again, by court rule written responses were not submitted.

c. Motion and responses to King's request for stay

King's third motion in the probate court cited MCR 5.802(C) to argue there was good cause to stay the appeal of the order removing King as personal representative.

King argued again that the court erred in permitting Maggie Erwin to act as an interested person to file the petition because her status as the surviving spouse was on appeal (Motion #2-3).[9] King further argued that the court erred by not ordering heirs to turn over any property to the estate (Motion #6); that the work King had done to track concealed assets would be for nothing unless a stay was entered. (Motion 8, 10, 13) King's pleadings acknowledged that although she had not filed it yet, King planned to appeal her removal. (Motion #12)

Maggie Erwin's written response admitted that the order denying change of venue was entered May 6 but stated that King did not appeal or file a motion for reconsideration before May 27, nor had an appeal of the order removing her been filed, so the June 17 requests for rehearing and a stay were untimely. She argued the record did not support King's allegations and that King had not asserted good cause for a stay of the order removing King as required by MCR 5.802(C). See generally Maggie Erwin's Response and Brief, probate court docket 6/18/15.

d. Motion and responses to King's request to disqualify Judge Thane

King's fourth motion to disqualify the judge argued that Judge Thane exhibited bias toward Maggie Erwin and her children and prejudice against King and the other children (Motion #4); that she failed to adhere to the appearance of impropriety (sic) (Motion #5), and that she could not hear the case impartially under MCR 2.003(C)(1) and must be removed. King relied on *Cain v Dept of Corrections*, 451 Mich 470, 548 NW2d 210 (1996), to argue that the appearance of impropriety required the removal of the judge. COA 329264 Appellant Brief Exh CC.

[9] The Court of Appeals had already denied King's motion for a stay based on the argument that Maggie was not an interested person by order of May 20, 2015.

King alleged that the court showed bias first on Jan. 22, 2014 when the court called Maggie Erwin's then-acting counsel about confusion over a hearing date, but failed to call L. Fallasha Erwin to participate in the May 18 hearing. King also argued the court unfairly called Maggie Erwin's counsel for a pretrial on June 10, 2015 on the funeral claim, instead of defaulting her for failing to appear. King did not acknowledge that the order removing King was signed May 28, 2015 so King had no standing to appear on the estate's behalf on June 10, or that the judge had held other hearings without calling counsel who failed to appear. King's affidavits of some heirs averred that the court only allowed Maggie's children to testify at hearings, not the other heirs, that Judge Thane consistently ruled against the affiants, that Judge Thane once improperly commented they had improper motives to proceed, and never ordered Maggie's children to disclose assets.

Maggie's response argued that the motion lacked specific factual allegations to support a claim of bias, that adverse rulings alone do not provide a basis for disqualification. See generally Maggie Erwin's Response and Brief 9-11. She further argued the motion was untimely under MCR 2.003 because the only alleged event within 14 days was the June 10 pretrial, but King had no standing to even appear on that day. Maggie argued that failing to call King on May 18 was not an example of bias because King's attorney was available to appear or call in that day and did not ask to adjourn the matter. Maggie argued that King improperly blamed the court for King's own failure to file a turnover action against any heir to recover assets. Erwin Oakes filed a written response pointed out that King was essentially arguing the same issues as in the motion to

change venue, and incorporated her prior pleadings. See Erwin Oakes's Responses to Motions generally.

e. Hearing and Order on King's four motions.

Counsel for Maggie and King both appeared for hearing on July 6, 2015 but counsel for Erwin Oakes did not and again, the court proceeded without calling him. King acknowledged that only two of the four motions could be argued orally before the court: the requests for a stay and to disqualify the judge. King's counsel repeated allegations that "although we requested items, nothing has been turned over" and said that a stay would benefit the heirs until the Court of Appeals ruled on Maggie Erwin's status. COA #329264 Appellee Brief Exh. 6, 7/6/15 Tr 4-5.

Regarding King's motion to disqualify the judge, King did not call witnesses or articulate any specifics. King stated "I'll just rest on what I filed" and then that said the court's ruling might not be based on fact, that the heirs disagreed with them and felt the judge was biased. Id 5. Maggie argued she was an interested person, and the stay was premature because King had not appealed the order to remove King yet. It was unclear whether King was trying to stay all proceedings or just King's removal. Id 6-8. Maggie argued that it did not serve the estate to freeze everything pending appeal and that someone needed to determine and administer assets regardless of whether Maggie was found to be the spouse or not. Id 8-9.

Regarding the motion to disqualify the judge, Maggie argued that not all rulings favored Maggie or her children and that instances of bias cited by King were vague and untimely. Maggie argued that it was shocking for King to use as evidence of judicial bias her counsel's own failure to appear for the May 18 hearing to remove King, when King

did not telephone or request an adjournment from the court. She argued the June 10 call regarding the funeral pretrial was simply a courtesy to L. Fallasha Erwin since King had already been removed as personal representative. Id 11-12.

The probate court denied King's motion for a rehearing on the order removing King. The court noted that counsel for Erwin Oakes was not present to argue and that only two attorneys were also present for the May 18 hearing to remove King. The court cited MCL 700.3611(2), 700.3705 and 3706 and found that it was "in the best interest of the estate to remove the personal representative," and continued the May 28 order. Id 23. The court denied the motion for rehearing on the change of venue. Id 24.

The court also denied King's motion to disqualify the judge claiming there were no specific allegations to justify disqualification and that adverse rulings alone are not sufficient. Id 24-25. The court quoted what it had told L. Fallasha Erwin on May 6 regarding his docket conflict for the 18th: ". . . just make sure that all the counsel knows about it, Mr. Erwin and provide the court as well" but King did not tell the court. Id 27, citing 5/6/15 Tr 30. The court stated that there were two ways to adjourn a hearing, by stipulation or motion, and King did neither, so the court had gone forward. Id 29.

As for King's motion for a stay, the court admitted confusion. The following exchange with L. Fallasha Erwin occurred:

> THE COURT: . . . I think there needs to be an order to stay as it relates to the issue of Maggie Erwin, whether or not she's a spouse. And I think you can take an order to that effect.
>
> But a stay on everything else, I have to find out what everything else is. . . . You have to be specific as to what it is that you're requesting in this matter. . . .
>
> MR. ERWIN: . . . If you're staying whether Maggie is a surviving spouse, you're saying that that motion shouldn't go forward. Because she's the one who filed it. And if that's stayed, it should have been stayed before. She filed the motion to remove the personal representative. And so if you're staying it now, it doesn't –

> THE COURT: I still have a personal representative though that will not, *if I provide the stay, that personal representative will not distribute all of the assets without a determination if Maggie is a surviving spouse.* (emphasis added)
>
> MR. ERWIN: She doesn't even have standing to bring it, your Honor. . .
>
> . . .
>
> THE COURT: We're waiting for the Court of Appeals to make that determination.
>
> MR ERWIN: But I'm saying what other provision says that as an ex-wife or a separated spouse that you have that authority? It's only if she's a surviving spouse.
>
> THE COURT: And I made the determination she is a surviving spouse. . . . you and I will always disagree on that.

The court resolved King's objections to Maggie Erwin's proposed order after another hearing on Aug. 13 and the final order was entered on Aug. 26, 2015. Exh. 5. King filed an appeal of all four of the orders from Aug. 26 in COA docket #329264.

F. Court of Appeal docket #323387: Proceedings related to Maggie's status as surviving spouse.

On appeal, King claimed the probate court erred by relying on, or even considering, the unsigned duplicates of the 2010 verified pleadings and affidavits arguing they were unauthenticated, that the court was unjustified in not taking witness testimony, and that the court improperly relied on attorney arguments rather than the factual record submitted. Maggie argued that King had the burden of proof and that the only relevant evidence submitted by King, that James and Maggie did not cohabitate, was insufficient to establish even a prima facie case that Maggie had willfully abandoned James as required by MCR 700.2801(2)(e). Appellee Brief at 19-21.

King's appellate brief did not disclose that in the probate proceedings King failed to object or submit evidence or authority attacking the 2010 pleadings or affidavits. King's appellate brief did not admit that King's attorney was the attorney for both Maggie and James in the 2010 case, and thus King knew that the documents were

genuine and true because he had also signed and filed them with the court.[10] King's late challenge to the authenticity of the unsigned affidavits raised for the first time in her Court of Appeals brief triggered Maggie's motion to supplement the record with signed versions of the affidavits certified by the trial court. After the first order was granted, King then restated a new challenge to the remaining verified pleadings in her reply brief (at 1), triggering a second motion and order to supplement the record with certified signed versions of those as well.[11]

Maggie argued that the certified affidavits and verified pleadings removed any doubt about their authenticity, and that King's credibility was undermined by her false statements to the court claiming otherwise. COA 323387 Appellee Brief at 22-24. Maggie argued that the statements that Maggie's death would cause "irreparable harm" to James rebutted any showing that Maggie was willfully absent from or deserted James prior to his death, particularly given her physical ailments. Maggie urged the court to consider that James never tried to disinherit Maggie, that she received his life insurance as well as the house when he died, and argued that a review of all facts and circumstances of the case as outlined in *Tkachik v Mandeville,* supra, showed that equity was in Maggie's favor and she should not owe contribution to the estate. Id 27-28.

The Court of Appeals upheld the probate court's rulings, finding that Maggie had not been willfully absent from James prior to his death, and thus qualified as his surviving spouse and did not owe equitable contribution to his estate. Exh. 1 The Court acknowledged the evidence that Maggie and James had not cohabitated since 1976 as

[10] King's statement in her application that "the affidavits were never signed" and were "unauthenticated" (at 12, 14) is false.
[11] In her application, King only mentions the pivotal Court of Appeals orders allowing Maggie to supplement the record in a footnote. At 22.

well as the evidence that they affirmed their marriage in 2010 more than 30 years later. Id at 5. The Court conceded that the factual record was sparse, but found that King had the burden to establish Maggie was not a surviving spouse and failed to do so. Id at 5. The Court found no error in the probate court's decision to rule on the basis of the documentary evidence and affidavits of the parties which did not involve credibility issues, without holding an evidentiary hearing. Id at 6.

The Court of Appeals reviewed the probate court's factual findings for clear error and statutory interpretation de novo. Id at 3. The court noted that because the Estates and Protected Individuals Code (EPIC) which governs probate proceedings did not define "willful absence" as used in MCL 700.2801, it is a factual question concerning more than physical proximity, and that considering the statute as a whole in the context of other desertion and willful neglect provisions, the Legislature did not intend that physical separation alone necessarily constitutes "willful absence." Id at 3-4.

The court interpreted MCL 700.2801(2)(e)(i) to require a trial court to consider all the facts and circumstances of the case, and stated that while physical separation may provide factual support to determine a spouse was willfully absent, it is only one factor among many and "does not necessarily preclude a spouse as a surviving spouse under MCL 700.2801(2)(e)(i)." Id at 4-5. The Court noted that its ruling avoided practical concerns because a more rigid interpretation could have unintended consequences, given that spouses who live apart because of jobs, education, health or family obligations could otherwise face a possible severance of their inheritance rights. Id at 5.

The Court of Appeals also ruled that the trial court did not err in finding Maggie was not unjustly enriched and did not owe contribution to the estate for receiving

entireties property. The Court found that *Tkachik* requires a showing of "special circumstances" to justify such an equitable ruling, and that here there was no evidence that, among other things, James tried to disinherit Maggie, or that they did not communicate, or that James sought sole ownership of the house, as there was in *Tkachik*. Id at 6. Therefore, the trial court's decision not to award equitable relief was "within the principled range of outcomes." Id at 7.

G. All other rulings in COA docket #329264 regarding removal of the personal representative, venue, and disqualification of the judge.

1. Removal of King as personal representative

On appeal of these issues, King did not dispute that she had filed an inventory showing $0 assets and provided no accountings to presumptive distributees but justified it by claiming Maggie and her children blocked King's efforts, that King and her attorney were not charging anything to the estate, and that most of the heirs did not want an accounting anyway so Erwin Oake's attorney's request for one was an irritant. She argued that because any errors she made could be remedied, the court was required to allow her to do so. King argued that she never harassed Maggie or other heirs, was not hostile to them, and that mere disagreement among the heirs did not provide a basis to remove her, under *Kramek*, 268 Mich App 565; 710 NW2d 753 (2005).

King also argued again that the judge was wrong to remove her because Maggie had no standing to file the petition while her status as surviving spouse was questioned on appeal. Without providing any legal basis, King discounted the second petition to remove filed by Erwin Oakes, whose standing to bring it was beyond dispute. Erwin Oakes did not file a responsive brief in the Court of Appeals.

Maggie's brief argued that the court did not abuse its discretion in removing King as personal representative. Maggie argued she qualified as an "interested person" under several legal sections of the probate code, and the Court of Appeals had already ruled on the matter twice by denying King's two motions for a stay of proceedings. Maggie incorporated her pleadings from those motions. COA #323964 Appellee Brief at 24. Even if Maggie had not been deemed an interested person to file the petition, Maggie argued there was no question that Erwin Oakes was, and she had filed a separate petition and notice of hearing supporting and joining Maggie's petition. Id at 24.

Maggie argued that King mismanaged the estate, failed to perform her duties by refusing to inventory or account to heirs, by her failure to recover estate assets, and by repeatedly filing repetitive pleadings that did not comport with Michigan law. Id at 25-26, 28. She argued King's hostile attitude interfered with the proper administration of the estate, providing good cause to remove her, citing MCL 700.3611(2), 700.3703(4), 700.3705(1)(d), 700.1212(1). Id at 26-28. She argued that a consideration of all the pleadings in the case revealed many other instances of mismanagement, such as King's motion to change venue filed after the petition to remove King, the secret subpoenas and other improper discovery, multiple motions for stay of proceedings and other motions for reconsideration or objections to proposed orders that merely raised the same issues. Id at 30-32. Maggie argued that the litigation was overwhelming and unnecessary, particularly in light of the $0 asset inventory King had filed. Maggie also argued that King had mischaracterized the record in many, many instances and made allegations and arguments with no evidence or law to support them.

The Court of Appeals upheld the probate court's order removing King as personal representative. Exh. 1 at 7. The Court acknowledged that while disagreement alone is not a sufficient basis to remove a personal representative under *Kramek*, "disagreement may rise to the level of implicating the best interest of the estate when it complicates the dispute or causes the estate to be unduly burdened." Id at 8, citing *Kramek* at 577. Here, the Court found that "the record is replete with familial conflict" and that the conflict extended to the personal representative's performance of statutory duties when King refused to provide an accounting to Erwin Oaks. At 8. The court agreed that replacing King with a neutral third party was within the principled range of outcomes.

2. Lack of jurisdiction to hear the venue and the disqualification issues

As a preliminary matter, Maggie argued that the Court of Appeals did not have jurisdiction of the venue or disqualification questions because MCR 5.801(B)(1) and (2) do not include change of venue or the disqualification of a judge as issues appealable to the Court of Appeals by right, and King had not followed proper procedure to seek an exception. See COA #329264 Appellee Brief Sec. IV. Maggie also argued that the motion for reconsideration of the venue order was not timely filed, so King had no appeal of right. The Court of Appeals agreed that King was not entitled to an appeal of right as to the venue or disqualification questions but exercised discretion to decide them anyway.

3. Venue

Regarding the probate court's refusal to change venue, King argued to the Court of Appeals that the rule for changing venue in probate court, MCR 5.128, is relaxed from the general rule in MCR 2.222, and that "an interested person only has to demonstrate the inconvenience of the present venue." COA #329264 Appellant's Brief at 16. King

claimed since she was the only one to stipulate to a change in venue, the probate court was required to consider the venue as inconvenient to other heirs who had not so stipulated, and erred by failing to hold an evidentiary hearing before deciding. Despite the fact that King opened James's probate estate naming Saginaw as his domicile at death and did not raise the argument in the probate court, King argued for the first time on appeal that venue was improper because James was actually domiciled in Kansas, and that he did not own property in Saginaw at his death because it passed to Maggie by operation of law. King claimed the probate court abused its discretion by refusing to change venue to Genesee County. Id at 14-16. King dropped the bias issue.

Maggie argued that the court had considered King's affidavits so an evidentiary hearing would have shed no new light on the issues, King had not requested witness testimony until after the court stated its opinion, and that the court did not abuse its discretion by rejecting King's motion given that King's attorney stipulated to the venue 18 months earlier. Maggie pointed out that King's interpretation of MCL 700.3201(4) and 600.856(1) failed to address the word "may" in the statutes which gave the court discretion to decide whether to change venue or not. She argued that the heavy burden on the courts and parties imposed by a change of venue order was unjustified by negligible time savings of only 10 minutes for most heirs. COA Docket #329264 Appellee's Brief at 22-23.

The Court of Appeals affirmed the venue change denial, and found that the probate court did not abuse its discretion because King's motion came more than 18 months after commencement of the action and after King had consented to venue in Tuscola County. Exh. 1 at 8.

4. Disqualification of the judge

King argued under MCR 2.003(C) to disqualify the probate judge because the judge was biased and did not preside fairly. As evidence, King claimed that court consistently ruled in favor of Maggie's children without holding evidentiary hearings; "allowed" Maggie to file a civil action to preserve her funeral claim and to change the hearing dates in the temporary restraining order; held the hearing to remove King even though King had assumed opposing counsel were adjourning it; and did not call King's attorney to participate while allowing other attorneys to appear by telephone in other matters. King claimed the court never sanctioned or ordered heirs to turnover assets. COA Docket #329264 Appellant's Brief, at 29-33.

Maggie argued that disqualification of a judge is granted only in extreme cases, citing *Cain v Dept of Corrections,* 451 Mich 470, 548 NW2d 210 (1996), and that King's motion was untimely under MCR 2.003(D)(1)(d) and (2) because it was not pursued within 14 days of discovery of the offending behavior, and not accompanied by an affidavit to justify late consideration. Maggie averred that because King did not call witnesses and explicitly relied on her pleadings, King's argument that the court erred by not holding an evidentiary hearing was baseless. Maggie argued King's evidence of bias was contrived, pointing out several instances where the judge had ruled in King's favor and also had held hearings when other attorneys failed to appear. Maggie claimed that King mischaracterized the record, and blamed the court for King's own failure to seek a hearing adjournment or turnover of assets (if indeed there even were any assets). Moreover, Maggie argued that adverse rulings alone do not support disqualification of the judge. COA Docket #329264 Appellee's Brief at 34-39.

The Court of Appeals ruled that the probate court did not abuse its discretion by deciding not to disqualify the probate judge. Citing *Cain* (supra), the Court stated that "the party who alleges that a judge is biased must overcome the heavy presumption in favor of judicial impartiality." At 497. It further stated that "judicial rulings almost never constitute a valid basis for bias, unless the judicial opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible.'" Exh. 1 at 9, citing *Cain* at 503. The court found that the probate court's "rulings against King had sound legal bases and did not demonstrate bias." Id. at 9.

VI. REASONS WHY APPELLANT'S APPLICATION FOR LEAVE TO APPEAL SHOULD BE DENIED

It should be noted that Appellant's application includes the unsigned versions of the 2010 pleadings, and ignores entirely the two Court of Appeals orders allowing Maggie to supplement the record with the certified signed versions, stating that Maggie and James were affirming their marriage. King's application also does not disclose that King's attorney, L. Fallasha Erwin, represented his father and stepmother in the 2010 case or that he signed and submitted to the trial court the original verified pleadings with the attached affidavits, and thus did not object to the unsigned versions of them in the probate court. Coupled with many other distortions of the record, King's omissions should be considered serious violations of MCR7.212(C)(6)'s mandate to include all material facts, both favorable and unfavorable. For that reason alone, the Supreme Court should decline to review the case.

A. The decision is not clearly erroneous and declining to review it would not cause material injustice under MCR 7.305(B)(5)(a).

The proceedings in this matter are frankly ridiculous in light of the fact that King reported no assets in the estate. Because both King and her attorney are the children of the decedent and Maggie's stepchildren, they have an enhanced personal stake in the outcome of these matters which overshadows and undermines their ability to rationally decide which legal issues to pursue and how to pursue them. In the lowers courts, the parties hotly contested each of the issues King seeks leave to appeal and many more. Although the *relevant* facts are simple, clear and undisputed, the record has become voluminous and burdensome, with many, many instances of King misstating facts and law to support her misguided claims.

Maggie and her children believe King and her attorney are using these burdensome legal proceedings to punish them. King's own inventory as personal representative discloses $0 assets. James' home – a nonprobate asset which King claims Maggie was unjustly enriched by receiving - was worth less than $15,000 when James died. Assets not on King's inventory but which may be in the estate total less than $7,000. It is hard to fathom what riches King and her brother/attorney believe are hidden from them. King had two years to find and recover all the assets they claim their stepsiblings have hidden or stolen, yet King never filed a petition to force a turnover or a civil action for conversion against anyone. King did not even take up the probate court's offer to reconsider discovery sanctions against other heirs if King could clarify what information she wanted, but instead makes the nonsensical argument that the probate court and heirs blocked her efforts to recover assets.

With so little at stake, it will be a pyrrhic victory regardless of who prevails. Granting leave to appeal would further burden the parties with more useless, expensive litigation over a valueless estate. The rulings, discussed in more detail below, are well supported by the facts and the law. There can be no showing of material injustice to merit their review under MCR 7.305(B)(5)(a). Indeed, accepting the case for review would unjustly advance King's efforts to punish Maggie and her children.

B. The heavily fact-based rulings bear no major significance to the public or the state's jurisprudence and need not be reviewed under MCR 7.305(B)(3).

With the exception of the ruling that a spouse may qualify as a surviving spouse even when she has not cohabited with her husband for more than a year, the other Court of Appeals questions on appeal primarily impact Maggie and the children of the decedent, and only superficially implicate larger questions of public interest the same way any lawsuit does. As evident in its decision not to publish, the Court of Appeals's heavily fact-based opinion offers minimal precedential value. The courts' factual findings are based on written affidavits - many submitted by King herself – and on the general record which speaks for itself. King's disagreement with the factual findings therefore cannot dislodge them as the bedrock of the opinions, or transform the rulings into matters of broader importance worthy of leave to appeal under MCR 7.305(B)(3). Leaving all of the rulings undisturbed will cause no new waves of litigation or otherwise impact the public.

C. Regardless of which statutory interpretation of MCL 700.2801(2)(e)(i) is applied to the case, the Appellee would prevail. Thus, it would not be useful to review it under MCL 7.305(B)(5)(b) to resolve any conflict in the Court of Appeals' decisions.

MCR 7.305(B)(5)(b) states that when a decision conflicts with another decision of the Court of Appeals it provides grounds to request leave to appeal to the Supreme Court. The *Erwin* decision possibly conflicts with another Court of Appeals decision decided two weeks later, *In re Estate of Peterson,* --- Mich App ---, 2016 WL 2992474, (May 24, 2016), regarding the statutory interpretation of MCL 700.2801(2)(e)(i) which governs when a spouse may be barred from inheriting as a surviving spouse. King failed to address this possible conflict so the Court should decline to review this issue for that reason alone. Substantively, it would not be useful for the Supreme Court to review the *Erwin* decision because it does not provide a sufficiently rich factual basis to resolve any conflict in the statutory interpretation of MCL 700.2801(2)(e)(i).

MCL 700.2801(2)(e)(i) states that when a spouse is found to be "willfully absent" from a deceased spouse for more than 1 year prior to death, she is not a surviving spouse for inheritance purposes. The *Peterson* court disagreed with the statutory interpretation of "willfully absent" in MCL 700.2801(2)(e)(i) employed by an earlier decision in *In Re Estate of Harris,* 151 Mich App 790 (1986), but *Erwin* cited *Harris* approvingly.

Maggie would prevail regardless of which standard of review applies. King simply offered *no evidence* whatsoever that Maggie's absence from James was *willful*, as required by the statute. King offered no affidavit from the children – only affidavits of neighbors –to prove the single bare fact that Maggie and James did not cohabitate for 35 years, which is not even in dispute. King did not allege, let alone prove, that there was antagonism between Maggie and James, that James tried to disinherit Maggie, remove

her from the house deed, take her off his life insurance, or offer any reason at all why they stopped cohabitating, let alone prove that Maggie willfully absented herself.

Given that millions of married people in the United States choose to live apart for reasons other than marital discord[12], proof of failure to cohabitate alone could never suffice to preclude a surviving spouse under MCL 700.2801(2)(e)(i). The legislature included the word "willful" in the statute for a reason; King simply ignored it. Without evidence that Maggie's absence from James was willful, King did not make a prima facie case to terminate her survivorship rights under *any* statutory construction.

Because Maggie would prevail under any scenario, there is insufficient factual detail in *Erwin* to generate a useful discussion of the different statutory interpretations of MCL 700.2801(2)(e)(i) employed by the *Erwin, Harris and Peterson* courts to resolve any possible conflict in the cases. Thus, the Court should decline to accept *Erwin* for review under MCR 7.305(B)(5)(b).

VII. STANDARDS OF REVIEW

The court reviews de novo whether the probate and Court of Appeals properly interpreted and applied the statute at issue. *Pransky v Falcon Gp.,* 311 Mich App 164, 173; 874 NW2d 367 (2015). The court reviews for clear error the probate court's findings of fact. *In re Raymond Estate,* 483 Mich 48, 53; 764 NW2d 1 (2009). A finding is clearly erroneous if the court is definitely and firmly convinced that the trial court made a mistake. *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011).

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[12] In a 2009 article, the New York Times reported that in 2006, the Census Bureau reported that 3.6 million married Americans (not including separated couples) were living apart from their spouses. *See* Living Apart for the Paycheck, Jennifer Conlin, Jan. 2, 2009 New York Times.

The court will not engage in statutory construction if the plain and ordinary meaning of a statute's language is clear, and unambiguous statutes must be enforced as written. *In re Kubiskey Estate*, 236 Mich 443, 448-449; 600 NW2d 439 (1999). When interpreting a statute, the court's goal is to give effect to the intent of the Legislature. Id.

VIII. ARGUMENT

A. The probate court properly exercised its discretion to rely on affidavits and the court record generally rather than hold evidentiary hearings.

The court properly decided Maggie's motion to remove King, and King's motions to change venue, for the disqualification of the judge, and to find Maggie did not qualify as surviving spouse based on the written record and affidavits the parties' provided from some heirs and other third parties. According to MCR 2.119(E)(2):

> When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.

The court thus had discretion whether or not to hold an evidentiary hearing with testimony from heirs or instead rely on the affidavits and other evidence in the record. Also, instead of calling witnesses, King explicitly relied on her pleadings and complained that the court should have asked other heirs to testify only *after* the court issued its rulings. Other heirs could have asked to speak, object or appeal in their own right but never did so.

Moreover, the entire written record was before the court. Live testimony could not have shifted the blame from King to the court for King's failure to follow even the most basic probate procedures, like providing a meaningful inventory or accounting, or filing a turnover action before complaining that the court did not order it, or requesting an adjournment before claiming the court should have granted it. Probate procedures are not

democratic. The fact that some of King's siblings might testify that they liked King's actions and dislike the court's rulings does not transform King's flawed proceedings into legally acceptable ones. The probate court properly acted within its discretion not to hold evidentiary hearings, and the Court of Appeal's affirmations should not be reviewed by this Court.

B. All decisions of the Court of Appeals require analysis of what makes a spouse's absence "willful," and mere proof that parties do not cohabitate cannot support a decision to sever a spouse's rights under any statutory interpretation of MCL 700.2801(2)(e).

MCL 700.2801(2)(e) governs when a spouse may be determined not to be a surviving spouse for purposes of receiving spousal allowances and an intestate or elective share of her deceased spouse's estate under the Estates and Protected Individuals Code (EPIC). A surviving spouse does not include any of the following:

> . . .
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
> (i) Was willfully absent from the decedent spouse.
> (ii) Deserted the decedent spouse.
> (iii) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law. MCL 700.2801(2)(e).

The Legislature did not intend to impose a mechanical rule where the intentional act of living physically separated from a spouse is synonymous with the willful act of being absent from a spouse. To rule otherwise would invite absurd results. An aging person who intentionally moves to a nursing home, a scientist who intentionally opts to do long-term research that requires her to live apart from family in a remote area, a woman who chooses to flee an abusive husband – these spouses could all face severance of their inheritance rights under a too-rigid interpretation of the rule.

In *In re Estate of Harris,* 151 Mich App 790 (1986), the surviving spouse had lived with his wife for short periods before her death, but was alleged to be emotionally absent from her and refused to finance a trip to the Mayo Clinic. The decedent had filed for, but not received, a divorce before she died. The *Harris* court found that physical abandonment or desertion must be continuous for at least a year under the statute, and declined to conclude that the surviving spouse forfeited his right to inherit. Though it is strong evidence, the court did *not* rule that physical absence *alone* justifies forfeiture of spousal rights, as King contends. The court stated that MCL 700.290(1)(a) should be read as "showing an intent by the Legislature that a spouse must intend to give up his rights in the marriage before such can be lost. . .[13] The requisite intent in the statute is shown by actions indicating a conscious decision to permanently no longer be involved in the marriage." Id at 786-787. The *Harris* court found that a more literal construction of the statute could otherwise end in absurd results which the Legislature did not intend.

The Supreme Court case of *Tkachik v Mandeville,* 487 Mich 38, 790 NW2d 260 (2010) helped establish that a "fact-specific inquiry supports that spousal relationships are best viewed as factual questions" as held by the *Erwin* Court. At 4. In *Tkachik*, the decedent's husband moved away and did not communicate during her last illness, and refused to help her maintain their substantial joint property, or do anything to take care of her, or even attend her funeral. Before she died, the decedent signed a new will disinheriting her husband, took him off her insurance and other assets, and she unilaterally signed deeds trying unsuccessfully to remove his name from the property.

[13] The section at issue in *Erwin*, MCL 700.2801(2)(e)(i), whether the spouse "was willfully absent from the decedent spouse," is nearly identical to the language in MCL 700.290(1)(a), which was repealed when EPIC replaced the Revised Probate Code. The Legislature could have modified the statute to overturn *Harris* but by adopting nearly identical language, did not do so. King's argument to the contrary is misguided.

The Michigan Supreme Court in *Tkachik* did not analyze MCL 700.2801(2)(e), but the trial court had done so, and ruled the husband a nonsurviving spouse. In going one step further (and changing Michigan precedent), the Supreme Court granted equitable contribution to the wife's estate for the cost of maintaining entireties property the wife had unsuccessfully tried to prevent passing to her husband, finding that *in this context* he had been unjustly enriched.

The Supreme Court ruled that equitable relief is limited to cases where a spouse has been deemed not a surviving spouse under MCL 700.2801. Id at 65. Contrary to King's argument, the Supreme Court explicitly *declined* to rule that every spouse who fails to qualify as a surviving spouse must pay equitable contribution. Throughout the opinion, the Supreme Court repeated its intent that the ruling to be narrowly construed to apply only to cases that exhibit other "special factual circumstances," such as the outrageous actions of the husband in that case. Id at 40, 46, 48, 55-56, 57.

In *Peterson*, supra, the surviving spouse's deceased husband had moved out of the home to be with his girlfriend, but his wife remained faithful to the marriage, prepared meals, operated the family store and maintained the marital property. She had no contact with her husband for the last year of his life because he did not want her involved. The court found that he caused the continued separation and her acquiescence thus did not establish that she was willfully absent from the marriage. The *Peterson* court opined that "the Legislature's use of the term "willfully" inherently establishes the requisite intent that an individual must have in order to be disqualified as a surviving spouse, without the need to engage in statutory construction: the individual must have acted or failed to act with the specific intent to bring about the particular result addressed in the statute.

Peterson, at 4. The *Peterson* court agreed with the conclusion in *Harris* that the phrase "was willfully absent" as used in MCL 700.2801(2)(e)(i) refers to physical absence, but disagreed that the statute requires "proof of intent to abandon one's marital rights." Id at 3, 4.

The Court of Appeals' opinion in *Erwin* approvingly cites both *Harris* and *Tkachik,* but does not address *Peterson* decided two weeks after it. The Court of Appeals noted that the term "willfully absent" is not defined in EPIC and dictionary definitions were unhelpful in determining "the manner in which the spouse must keep the other spouse away: whether the distance be physical, emotional, or some combination thereof." Ex. 1, at 4. However, by reading the willful absence provision in the context of EPIC as a whole, particularly in light of the desertion and willful neglect provisions, the panel was able to determine that the Legislature did not intend any of the terms to apply in cases of sole physical separation. The court relied on both the *Harris* and the *Tkachik* decisions to conclude that a party's presence is only one part of a fact-based analysis of all the facts and circumstances of the case, and, contrary to King's position, physical separation alone does not necessarily preclude a spouse from qualifying as a surviving spouse under MCL 700.2801(2)(e)(i). Id at 4-5.

All of Michigan's cases – *Harris, Tkachik, Erwin* and *Peterson* - require a contextual, fact-based inquiry - beyond proof of mere lack of cohabitation - to determine whether a surviving spouse's absence from her spouse for one year or more before death was "willful" to justify severing her inheritance rights under MCL 700.2801(2)(e)(i).[14]

[14] Appellant's reliance on *Grotelueschen v Grotelueschen,* 113 Mich App 395 (1982) is misplaced. *Grotelueschen* was a divorce case that questioned whether the trial court erred by granting a divorce without proof of the grounds for divorce, and when one spouse wanted to preserve the marriage. The holding, that the objects of matrimony have been destroyed if either party is unwilling to live together, is

C. Under any interpretation of MCL 700.2801(2)(e)(i), King failed to submit *any* evidence that Maggie willfully absented herself from James.

"A party claiming the benefits of a statutory exception bears the burden of proving that section applicable." *Brown v Beckwith Evans Co.*, 192 Mich App 158, 168-169, 480 NW2d 311, 316 (1991). Thus King had the burden of proving that the statutory exception of MCL 700.2801(2)(e)(i) applies to sever Maggie's rights as surviving spouse.

The only evidence King submitted were three bare-boned affidavits from nonfamily members which proved only that Maggie and James did not cohabitate in the Douglass St. house for 30 years, a fact never contested by anyone. King called no witnesses, and expressly relied on her pleadings. It is telling that King did not allege details or offer affidavits from any of James's children to clarify the nature of Maggie and James's relationship or the reasons *why* Maggie did not live at Douglass St. If James asked her to move, or did something that forced her to move, or there were external circumstances that made her moving necessary, then it was not a willful absence on her part. Under *any* of the Court of Appeals decisions, King's scanty evidence could not establish a prima facie case of willful abandonment.

Though King's application distorts the record, King's attorney in fact admitted that Maggie and James had an ongoing relationship, and that he filed the pleadings in which Maggie and James affirmed under oath that their marriage was continuing 30 years after they began living apart, and only 2 years before James died, and that Maggie's death would cause "irreparable harm" to James. King presented no evidence that the affirmation was coerced or fraudulent. King also presented no evidence that Maggie acted or failed to act in any manner that changed these circumstances during the period of

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couched squarely in terms of the law's transition to "no fault" divorces. It is not controlling in the context of probate.

time after the marriage affirmation until James died, although James moved in with his daughter due to ill health shortly before he died.

The Court of Appeals noted that while the record was sparse, King had the burden of proof and that the three affidavits did not operate to foreclose a "continued emotional intimacy" between Maggie and James. At 5. Because the trial court's findings of fact can only be overturned for clear error, the Court of Appeals was not convinced a mistake had been made in finding that Maggie was entitled to inherit as James's surviving spouse. At 5. The ruling is well reasoned and should be allowed to stand without review.

The result would not change if the Court had applied the statutory construction established by *Peterson* requiring proof that Maggie acted or failed to act with the intent to bring about a specific result-in this context, i.e. willfully absenting herself from James. With no evidence as to why Maggie moved out of the home or to prove that she was the one who acted willfully in moving, the mere fact that Maggie and James did not cohabitate was insufficient to support a ruling she intended to sever her right to inherit.

D. Considering all the facts and circumstances of the case as outlined in *Tkachik v Mandeville*, there is no basis to overturn the finding that Maggie was not unjustly enriched by receiving entireties property from James.

King erroneously argues that *Tkachik v Mandeville* is a blueprint for this matter, and mandates an award to James's estate because Maggie was unjustly enriched by receiving entireties property when James died. 487 Mich 38; 290 NW 2d 260 (2010). Under *Tkachik*, an equitable award for unjust enrichment is conditioned on a prior ruling that the spouse had been "willfully absent from the marriage for over a year" and was thus not a surviving spouse under MCL 700.2801(2). Even if that condition is met, the

court must consider all the facts and circumstances of the case in order to justify the unusual remedy of requiring the spouse to contribute back to the decedent's estate.

The only fact in evidence, that the Maggie and James did not cohabitate, is not proof that Maggie's absence was willful. Nor are there any special circumstances to show antagonism between James and Maggie, because, unlike the decedent in *Tkachik,* James left Maggie his life insurance, never tried to remove her from the deed, and did not execute a will disinheriting her. Therefore, King offered no basis to upset the Court of Appeal's affirmation of the probate order declining to award contribution.

E. The Court of Appeals properly affirmed the decision not to change venue 18 months after King stipulated to venue in Tuscola County.

King's argument that the order denying a change of venue should be reviewed is also devoid of merit. King's attorney stipulated to the venue 18 months earlier. King's argument fails to acknowledge that the probate court had discretion to deny a venue change under MCL 700.3201(4) and MCL 600.856(1) which state that venue "*may* be changed" for the convenience of parties and witnesses or when an impartial trial cannot be had in that county. King's own petition showed it would have saved most heirs a negligible 10 minutes of driving time per hearing. The court needed no evidentiary hearing to deny the request and the ruling should not be overturned on appeal.

F. King's inability to properly administer the estate was amply demonstrated in the record and warranted her removal as personal representative.

MCL 700.3611(1) permits "an interested person" to petition for removal of a personal representative "for cause at any time" including, among other things, when removal is in the best interest of the estate, or the personal representative mismanaged the estate or failed to perform a duty of the office. MCL 700.3611(2)(a) and (c)(iii) and (iv).

Although EPIC does not require accountings to be filed with the *court* in most instances (MCR 5.203), a personal representative does have a duty to identify assets and account annually to the *presumptive distributees*. MCL 700.3703(4).

MCL 700.1105(c) defines a "spouse" as an interested person, and because it does not use the more specific term "surviving spouse," Maggie was an interested person for all purposes even while her status as "surviving spouse" was questioned on appeal. In addition, the probate and the Court of Appeals specifically declined to enforce a stay to preclude Maggie from acting as an interested person.[15] King did not appeal the stay to try to exclude Maggie as an interested person. Whether Maggie had standing as a surviving spouse is also moot because Erwin Oakes filed a separate petition with separate notice of hearing to remove King, and her standing as an heir is unassailable.

King falsely claims there was no evidence or grounds to remove her. In fact, the entire probate court record reflects grounds to remove King and award sanctions against both King and her attorney for filing pleadings over a period of 2 years which relentlessly repeated arguments with no basis in law or fact. The probate court had to tell King repeatedly that Maggie was an interested person. The court also reserved and preserved Maggie's request for sanctions against King for discovery that exceeded both the funeral claim and the order allowing limited interrogatories on assets, and entered a temporary restraining order. King does not dispute that she refused to give heirs an annual account of assets and expenses of estate but King dubbed the request for one "an irritant," despite the requirements of MCL 700.3703(4). Application at 33. King's misstatements and omissions in her application display once again King's utter disregard for legal process

[15] The probate's court's recently-entered partial stay was intended to prevent an early distribution of assets to Maggie, but not prevent her from being considered an interested person in the estate.

and for the fundamental responsibilities of personal representative, and provide further reason why the decision to remove King should remain undisturbed.

King falsely claims that "the probate court has steadfastly refused to order Maggie or Nash, BJE and Oakes to turnover assets to King or order sanctions when requested." Id at 29. In fact, the record reflects King never filed a turnover petition, a conversion claim, or any other lawsuit or proceeding against Nash, Erwin Oakes, or anyone else, so the probate court had no legal basis to order a turnover. To the contrary, King's failure to seek a turnover properly is more evidence of how she mismanaged the estate.

The probate court had a more than adequate basis to remove King as personal representative and did not require an evidentiary hearing to order it. The appointment of a neutral, third party is a benefit to everyone in the estate. It will permit the neutral personal representative to investigate assets (if any), close the estate swiftly, and stop this baseless litigation. Review of this issue will have no effect whatsoever beyond the parties involved in the lawsuit, the effect of a review on the parties would be deleterious, and therefore review should be denied.

G. Because the probate court's adverse rulings are well-grounded in fact and law, they do not display deep-seated favoritism demonstrating judicial bias. Thus, King cannot overcome the heavy presumption favoring judicial impartiality.

According to MCR 2.003(C)(1), grounds for disqualifying a judge include:

> (a) The judge is biased or prejudiced for or against a party or attorney.
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 U.S. 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

MCR 2.003(D)(1)(a) requires a motion for disqualification to be filed within 14 days of discovery of the grounds for disqualification so that trial is not delayed.

Untimely motions may be granted but only for good cause, as shown in an accompanying affidavit.[16] MCR 2.003(D)(1)(d) and (2). Here, King's motion to disqualify was not filed within 14 days of any legitimate event and King did not submit to the probate court an affidavit of cause as to why it should be heard late.

In *Cain v Dept of Corrections,* supra, the Michigan Supreme Court declined to disqualify a judge who was publicly feuding in the media with the governor in a case involving a department of the State of Michigan. The court stated:

> Coupled with the requirement of actual bias, § (B)(1) also requires that the judge be "personally" biased or prejudiced in order to warrant disqualification pursuant to this section. . . . This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding.
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> . . .
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> Thus, *Liteky* indicates that a favorable or unfavorable predisposition that springs from facts or events occurring in the current proceeding may deserve to be characterized as "bias" or "prejudice." However, these opinions will not constitute a basis for disqualification "*unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.*" *Cain v Dept of Corrections,* supra, at 495-496, citing *Liteky v. United States,* 510 U.S. 540, ——, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474 (1994).

The *Cain* decision acknowledges that courts become annoyed at parties and their attorneys, often because of how the case before them is developed. Unless that annoyance is so "deep-seated" that fair judgment becomes impossible, it is not a basis for disqualification.

The record in this case is clear though King's presentation of it is not. King mischaracterized Judge Thane's single statement of impatience; it did not exhibit bias because it was directed at "*all*" the children, not just King's side of the family. Nor did

[16] King submitted affidavits attached to the Appellant's Brief on this issue that were not supplied to the probate court and they should thus not be considered on appeal. See COA #329264 Appellant's Brief Exh. A.

adverse rulings against King exhibit bias. Judge Thane sometimes ruled in King's favor, and rulings against King have sound legal and factual bases. Nor did Judge Thane exhibit bias by deciding to proceed with the hearing to remove King without telephoning her because the judge held several other hearings without one or more of the three attorneys present without calling them. King could have called the court on May 18 for the hearing to remove her but did not. Judge Thane cannot be considered biased for refusing to accept the blame for King's failure to request or obtain an adjournment, and was justified in proceeding without King.

The fact that the court called counsel for Maggie for the pretrial because she did not appear on June 10, 2015 is a red herring, not evidence of bias, and it is yet another misstatement of law and fact. MCR 5.802(C) does not impose an automatic stay of an order to remove a fiduciary. King was removed by order dated May 28 so King had no standing to appear at the June 10 pretrial, a fact she ignores in her application.

Finally, King has mischaracterized the record on review by including events that occurred after the order denying disqualification was entered. The final order on the matter is dated August 26, 2015, but King improperly included events that occurred in September through December of 2015 in her application to this court. See Appellant's Application at 39. These events therefore do not present a basis for review of the order.

King's probate pleadings included many similar instances of blatant disregard for the facts, law and procedure. Yet a general review of the transcripts reveals that Judge Thane considered all arguments presented, and treated King and her attorney with patience and respect beyond expectation. King has presented no evidence to suggest that

Judge Thane exhibited annoyance that was "so deep-seated that fair judgment became impossible" as required by *Cain*.

King's application raises no genuine issues to sustain an argument that the Court of Appeals erred by holding that the probate court did not abuse its discretion by refusing to disqualify the judge. Thus the Supreme Court should decline to accept the matter for review.

IX. REQUEST FOR RELIEF

There is no basis to overturn the Court of Appeal's decisions that these rulings did not fall outside the range of principled outcomes. Appellee Maggie Erwin requests that the Supreme Court deny Appellant's application for leave to appeal and allow all of the rulings of the Court of Appeals in Docket #323387 and #329264 to stand.

Dated: Aug 5, 2016

Respectfully Submitted,

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